

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



# 75-2124

To be argued by:  
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.  
WILLIAM STUBBS,

Petitioner-Appellant,

-against-

H.J. SMITH, Superintendent,  
Attica Correctional Facility,

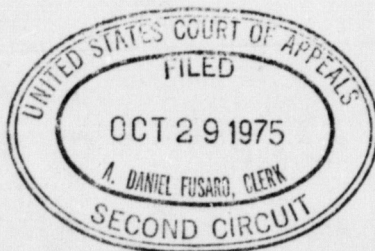
Respondent-Appellee.

Docket No. 75-2124

B  
P/S

APPENDIX TO THE BRIEF  
FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER  
OF THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Petitioner-  
Appellant WILLIAM STUBBS  
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RICHARD A. GREENBERG,  
Of Counsel.

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Civ-1972-598

C. Form No. 106 Rev.

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Civ-1972-598

DATE	PROCEEDINGS	Date Order Judgment N
1972		
Nov. 10	Filed Petition	
10	Filed Order allowing filing in forma pauperis & Order returnable 12/22/72 why writ should not issue and respondent to produce records. Curtin DJ	F-13
10	JS 5 made	
Dec. 11	Filed additional petition	
11	" Decision & Order that addl. appl. will be filed and considered part of instant action. Curtin DJ Notice & copies Messrs. Stubbs and Lefkowitz	
22	Order to show cause adj. until 1/26/73; 2/2/73; 3/23/73; 4/6/73; 4/27/73 5/1/73	
1973		
May 3	Filed Decision & Order Denying application for release on bond pending determination of instant appl. for writ of habeas corpus. Curtin DJ Notice & copies petr. & Lefkowitz	F-14
3	" Letter application for release on bond	
Oct. 30	Filed order that respondent submit briefs on appeal or an affidavit explaining why they could not be obtained & this matter by adj until 11-15-73-Curtin, DJ Notice & copies to Petr. & Louis J. Lefkowitz.	F-14
Nov. 15	Last day to file briefs 12-6-73. Submitted.	
Dec. 17	Filed order appointing Mark Hulnick counsel & that petr's. brief shall be submitted to the Ct. by 2-14-74 & respondent by 3-28-74 Curtin, DJ Notice & copies to Petr., Louis J. Lefkowitz & Mark Hulnick adj. 2-28-74	F-14
17	Filed copy 5 of CJA-20 appointing Mark Hulnick counsel. Copy 4 mailed to Adm. Office.	
1974		
Mar. 4	Return date for respondents brief. adj. 4-29-74	
Apr. 29	Ret. date for respondents brief. Adj. to 6-24-74. Submitted.	
July 15	Oral argument on motion. Adj. to 7-22-74. Submitted.	
1975		
May 29	Filed decision & order denying in all respects the petition, certificate of probable cause is denied, permission to appeal in forma pauperis is denied with the qualification that the petr. may file with the Clerk a notice of appeal w/o payment of filing fees etc.-Curtin, DJ Notice & copies to Mark A. Hulnick & Louis J. Lefkowitz	
29	JS 6 made	
June 4	Filed CJA-20 copy 2 approving \$250.00 for Mark Hulnick. Copy 1 mailed to administration office.	
July 24	" Petitioner's Notice of Appeal (copy mailed to Mr. Lefkowitz, Bflo., with copy of CCA Form C, and to Clerk, CCA with copy of docket entries and original Form C)	
Sept. 5	File sent to U.S. Court of Appeals	
25	File returned from U.S. Court of Appeals	
25	Filed copy of order of CCA granting motion for certificate of probable cause, for leave to proceed in forma pauperis and for assignment of counsel	

CLOSED



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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WILLIAM C. STUBBS,

Petitioner

v.

Civil 1972-598

ERNEST L. MONTANYE, Superintendent,  
Attica Correctional Facility,

Respondent

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APPEARANCES: MARK A. HULNICK, ESQ., Buffalo,  
New York, for Petitioner.

LOUIS J. LEFKOWITZ, ESQ., Attorney General  
of the State of New York (DOUGLAS S.  
CREAM, ESQ., of Counsel), Buffalo, New  
York, for Respondent.

The petitioner was convicted in 1966 in Monroe County Court of assault and possession of a firearm. He was sentenced as a second felony offender to consecutive terms of 19 to 20 years on the assault charge and 13 to 14 years on the weapons possession charge. He is currently incarcerated in the Attica Correctional Facility.

At the time of his sentencing, the petitioner himself raised the issues which he asks this court to review. In light of the summary affirmances of the conviction, it is difficult to ascertain whether the state court considered these questions. However, in the court's view, requiring exhaustion would be futile because the contentions made are without merit.

Petitioner's first point relates to a charge to the jury of former New York Penal Law Section 1899. That section imposes a statutory presumption of possession of a weapon against all of the occupants of a motor vehicle in which a weapon is found. Petitioner contends that his co-defendant's plea of guilty to the weapons possession charge made the use of the presumption a violation of his right to due process.

The weapon itself was found in the glove compartment of an automobile in which the petitioner was a passenger. It was the only weapon found. The co-defendant, Shirley Miller, was the driver. Both were



apprehended together shortly after the assault incident took place, for which the petitioner alone was charged and convicted. The assault was with a firearm. Before trial, both defendants pleaded guilty to the weapons possession charge, but the petitioner withdrew his plea.

Petitioner argues that the plea of guilty to the possession charge by his co-defendant constitutes actual possession on the part of his co-defendant. Therefore, the exception under the statute when one occupant has actual possession [former New York Penal Law Section 1899(3)(a)] must be applied to him. No authority for this contention, that a guilty plea can be equated with actual possession, was presented. If the presumption is valid in a joint trial, to apply it after a plea seems to me equally valid.

From a constitutional standpoint,

. . . If a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a



rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.

Barnes v. United States, 412 U.S. 837, 843 (1973).

In the instant case, there was sufficient evidence before the jury for them to conclude beyond a reasonable doubt that the weapon was found in the glove compartment. This, coupled with the evidence of the petitioner's involvement in a shooting minutes before, was sufficient for a finding of power to exercise dominion and control over the weapon by the petitioner. See Craven v. United States, 478 F.2d 1329 (6th Cir. 1973), cert. denied, 414 U.S. 866 (1973).

The petitioner emphasizes that in the court's charge itself there was a clear implication that no passengers were involved. (Transcript at p. 350.) On the trial of the indictment, this was in fact the case but in any event, petitioner's counsel raised no objection to the charge.

For an instruction to be constitutionally defective, it must not be merely erroneous, or even

condemned, but violative of a defendant's fourteenth amendment rights. Cupp v. Naughton, 414 U.S. 141, 146 (1973). In viewing the charge as a whole in this case, the instruction falls far below the constitutional threshold.

The petitioner's second point is that the prosecution concealed evidence vital to the defense in derogation of the petitioner's due process rights under Brady v. Maryland, 373 U.S. 83 (1963). The evidence allegedly concealed is Shirley Miller's plea of guilty to the weapons possession charge. The fact of the plea, however, was not within the exclusive knowledge of the prosecution. It was known to the defense and their failure to bring it out at the trial can clearly be justified as a valid defense tactic. Therefore, I find no merit to the second contention.

The petition is in all respects denied.

Certificate of probable cause is denied.

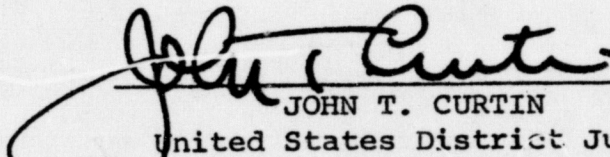
Permission to appeal in forma pauperis is also denied, with the qualification that the petitioner may



file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal, without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

So ordered.

  
JOHN T. CURTIN  
United States District Judge

DATED: May 29, 1975

CERTIFICATE OF SERVICE

October 29, 1975

I certify that a copy of this brief and appendix  
has been mailed to the Attorney General of the State  
of New York.

Richard A. Greenberg